

Service Date: July 18, 1995

**DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA**

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| IN THE MATTER OF BURLINGTON) | TRANSPORTATION DIVISION |
| NORTHERN RAILROAD COMPANY,) | |
| Petition to Close Forsyth Agency) | DOCKET NO. T-94.49.RR |
| and Complaint by Transportation) | |
| Communications International Union.) | ORDER NO. 6370 |

PROPOSED ORDER

APPEARANCES

FOR THE APPLICANT:

**Mark D. Etchart and Leo Berry, Browning, Kaleczyc, Berry, and Hoven, P.C.,
Attorneys at Law, P.O. Box 1697, Helena, Montana 59624**

FOR THE PROTESTANTS:

**Lee Kerr, Attorney at Law, P.O. Box 72, Hysham, Montana 59038, and James T.
Mular, Legislative Director TCU, 440 Roosevelt Drive, R-1, Butte, Montana 59701, on
behalf of Transportation Communications International Union**

FOR THE COMMISSION:

**Martin Jacobson, Staff Attorney, and Wayne Budt, Transportation Division
Administrator, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601**

BEFORE:

NANCY MCCAFFREE, Commissioner and Hearings Examiner

INTRODUCTION

1. On May 11, 1994, Burlington Northern Railroad Company (BN), pursuant to Section 69-14-202, MCA, filed before the Public Service Commission (PSC) a petition to discontinue local agency services at its Forsyth, Montana, agency facility. BN did not request closure, or other disposition, of the facility used to provide those services.

2. On May 19, 1994 the Transportation Communications International Union (TCU) filed before the PSC a complaint against BN, alleging that BN, without first obtaining approval from the PSC, had already unlawfully transferred agency services and reduced the number of agency staff at its Forsyth facility. TCU also intervened in BN's petition to close.

3. The PSC has consolidated BN's petition and TCU's complaint as above-entitled. Hearing on the consolidated docket was held on September 22, 1994, in Forsyth, where evidence and public comment was heard. The parties then agreed that a Proposed Order may be issued without briefing, factual and legal arguments being reserved for the procedure on exceptions, if such arguments then appear to be necessary.

FINDINGS OF FACT

4. All introductory matters which can properly be considered as findings of fact and which should be considered as such to preserve the integrity of this Order are incorporated herein as findings of fact.

5. The PSC has heard and decided a number of railroad petitions to discontinue local agency services. Many have involved corresponding complaints, like the one presently filed by TCU. In each of the last several years an average of four to six agency matters have been determined (involving BN and other railroads), petitions being granted or denied and complaints being upheld or overruled as the evidence demonstrated and the law required. Although each case is unique, some of the general evidence in each is similar.

6. In this regard, railroads frequently provide testimony that the role of the local agent and agency, although once a key factor and hub for local community transportation needs in the shipment and delivery of freight, express, and mail and passenger service, has significantly changed. Railroads now generally only provide carload freight services. In addition, new communication and record keeping capabilities (e.g., telefax, computers) have

allowed for a more efficient service from centralized locations, 24 hours a day. The past methods of on-site hand-processing of bills of lading and waybills and on-site record keeping have given way to computerization and electronic transmissions through centralized facilities. In some instances customers even have direct computer access with the railroad for services. See, e.g., Matter of Burlington Northern, Hardin Agency, Docket No. T-9595, Order No. 6079, ¶¶ 8-12 (February 12, 1992).

7. For BN's Forsyth agency petition the evidence is substantially the same. In addition, BN witness, John Miskulin, a BN customer service manager and supervisor, Glendive and Forsyth areas, testified that BN must computerize and centralize its customer service operations in order to remain competitive in the transportation market. It is Miskulin's opinion BN can provide a better service through computerization and centralization, one of the predominant points being 24 hour service replaces normal business hour services. BN witness, Tom Wambolt, BN's area trainmaster, testified customer service and direct customer contact are also accomplished through the train crews. It is Miskulin's and Wambolt's opinion the local agent is not necessary at Forsyth.

8. As BN exhibits demonstrate, as early as October 1985, BN did transfer or express an intent to transfer Forsyth agency work to BN's Glendive, Montana, centralized agency. At that time customers were given the opportunity to conduct business through that central agency. However, as Miskulin testified and the record otherwise demonstrates, BN has maintained an agent at Forsyth for normal business hours, seven days per week, available to perform agency functions and performing those when required.

9. On the above points there is no substantial evidence of record to the contrary. There is also no evidence suggesting that a centralized agency is, or would be, unable to provide the services as well as the local agent. No shippers testified at hearing. BN witness, Paul Froelich, accountant, provided testimony that the Forsyth agency remains profitable for BN.

10. Another factual concern in agency petitions is the effect of discontinuance of agency services on the general public. This aspect, as it pertains to this case, also generally flows along similar lines in comparison with other agency petitions. At hearing comment was

received from several public witnesses. Concerns expressed by the public witnesses related to safety, communications regarding safety matters, and potential effects on the local economy in the absence of an agent. However, there is no substantial evidence of record that indicates that the local agent is uniquely capable of alleviating the expressed concerns. There is no evidence the local agent performs an essential safety function or any pertinent function that is related to the local economy.

11. Common threads also run through the complaints which have been filed before the PSC in regard to agencies. Generally it is asserted that the railroad has violated the law by transferring agency services and reducing staff prior to obtaining PSC approval to do so.

12. As discussed above, the record shows that BN, as early as October 1985, intended to transfer Forsyth agency work to its Glendive centralized agency and provided the opportunity for its customers to obtain service through that central agency. However, the record also demonstrates that BN has maintained an agent at Forsyth for normal business hours, seven days per week. There is no evidence submitted by TCU or another that the local service was abolished or that BN demanded that customers obtain service through Glendive only.

13. TCU's evidence related to BN's reduction in the number of staff performing agency functions at Forsyth is primarily through BN's former (now retired) Forsyth agent, Sidney Schelin, who testified that there were eight positions and two extra board positions at the Forsyth agency on January 1, 1987 (a key date referenced in the controlling statute, Section 69-14-202, MCA). According to Schelin, all of these positions, including the extra board, worked together doing the tasks of both "clerk" and "agent," as needed. Schelin indicated that, at all times (relevant to this proceeding), only one of these positions was specifically designated by BN as an "agent" (or "agent/operator" or "agent/general clerk"). TCU witness, Robert Lincoln, extra worker and, current relief agent at Forsyth, agreed with Schelin, but added that the actual "agency" work has been a small percentage of the work involved. No substantial evidence of record contradicts these things.

CONCLUSIONS OF LAW

14. All findings of fact which can properly be considered conclusions of law and which should be considered as such to preserve the integrity of this Order are incorporated herein as conclusions of law.

15. The PSC has jurisdiction over BN's petition and TCU's complaint. See, Section 69-14-202, MCA; see also, Sections 69-1-102 and 69-14-111, MCA, and, generally, Title 69, ch. 14, MCA. TCU has standing to complain and standing to intervene as a member of the public and as a representative of its union members who are agents. See, Section 69-14-202, MCA; and see generally, Title 69, ch.14, part 10, MCA.

16. Discontinuation of railroad agency services is specifically governed by Montana statute. Section 69-14-202, MCA (railroad's duty to furnish shipping and passenger facilities) provides:

(1) Every person, corporation, or association operating a railroad in the state on January 1, 1987, or a successor thereto, shall maintain and staff facilities for shipment and delivery of freight and shall ship and deliver freight and accommodate passengers in such facilities as were maintained and staffed on January 1, 1987.

(2) However, if a person, corporation, or association operating a railroad demonstrates to the public service commission, following an opportunity for a public hearing in the community where the facility is situated, that a facility is not required for public convenience and necessity, the commission shall authorize the closure, consolidation, or centralization of the facility. In determining public convenience and necessity, the commission shall, prior to making its decision, weigh and balance the facts and testimony presented at the hearing, including the facts and testimony presented by the general public, the existing burdens on the railroad, the burdens placed upon the shipping and general public if the application is granted, and any other factors the commission considers significant to provide adequate rail service.

17. In accordance with this statute railroad agency facilities must continue to be maintained and staffed as they were maintained and staffed on January 1, 1987 (for purposes of shipment and delivery of freight and accommodation of passengers), unless the railroad first demonstrates to the PSC that the public convenience and necessity does not require the

services or facility. In determining whether the public convenience and necessity requires the services or facility the PSC considers all factors significant to the provision of adequate rail service and the burdens on the shipping and general public and the railroad, weighing and balancing all evidence including public testimony.

18. In BN's petition BN has the burden of demonstrating that the public convenience and necessity does not require the local agent. BN has carried this burden, as the evidence supports that the public convenience and necessity does not require the local agent. There is no evidence to the contrary. When there is no evidence suggesting that a centralized agency would be unable to provide the services provided by a local agent the PSC generally cannot conclude that a burden will be placed on the shipping public by allowing closure of the agency. Matter of Burlington Northern, Malta Agency, Docket No. T-9914, Order No. 6191, ¶ 28 (April 26, 1993).

19. Furthermore, in the absence of shipper opposition to a petition to close an agency or discontinue local agency services, it is difficult for the PSC to conclude as a matter of law that the public convenience and necessity requires that a railroad continue to offer local agency services. See generally, Matter of Burlington Northern, Harlem Agency, Docket No. T-93.117.RR, Order No. 6283, ¶ 18 (March 1, 1994). In context, the absence of shipper witnesses also can support the railroad's assertion that it is fully capable of providing services to the local area through a centralized agency. See, generally, Matter of Burlington Northern, Sidney Agency, Docket No. T-9632, Order No. 6094, ¶ 15 (April 14, 1992).

20. For concerns expressed by the nonshipping public the PSC has required there be a showing that the local agent is uniquely positioned to mitigate the concerns. As Matter of Montana Rail Link, Garrison Agency, Docket T-9984, Order No. 6241a (reconsideration), ¶¶ 41 and 42 (October 5, 1993) indicates, the PSC has categorized burdens on the general nonshipping public, as opposed to the shipping public, as being "safety" burdens or "other" burdens. When considering testimony on such burdens the PSC has generally concluded it needs to be convinced in the absence of the agent there will be serious safety problems or other significant problems that an agent is uniquely able to prevent or solve. See, Matter of Burlington Northern, Hysham Agency, Docket No. T-9182, Order No. 5866, ¶ 30 (December

11, 1989); and Matter of Union Pacific, Silverbow Agency, Docket No. 9447, Order No. 6036a, ¶ 22 (January 21, 1992). In regard to safety the PSC has also concluded it will examine whether the local agent, by defined duties or course of conduct, provides an essential safety function which is necessary to provide adequate rail service. See generally, Matter of Burlington Northern, Sidney Agency, Docket No. T-9632, Order No. 6094, ¶ 16 (April 8, 1992).

The local agent at Forsyth is not uniquely positioned, by defined duties or course of conduct, to mitigate the concerns (safety or other) expressed by the public.

21. In TCU's complaint TCU has the burden of demonstrating that the complaint is justified. The first aspect of TCU's complaint, transfer of agency functions, is not supported by substantial credible evidence. TCU did not carry its burden of establishing a prima facie case. The record demonstrates that BN has maintained an agent at Forsyth and the agent was so maintained for performing agency functions, as required. The record demonstrates that BN customers maintained an option for local service and were not compelled by BN to do business through the centralized agency.

22. The facts in some agency closure matters have caused it to appear to the PSC that BN has implemented a strategy of eliminating shipper need for local agency services by first eliminating those services. Such strategy has been declared unacceptable to the PSC. See generally, Matter of Burlington Northern, Froid Agency, Docket No. T-93.116.RR, Order No. 6289, ¶ 29 (April 12, 1994). A railroad must obtain PSC approval prior to closing, consolidating, or centralizing an agency. An attempt to first transfer local agency duties to a central agency, remove local agent responsibilities, and then apply to the PSC for closure -- the local agency being already closed, consolidated, or centralized (in fact) is a violation of law. The PSC has declared that it will no longer tolerate this course of conduct by BN. See generally, Matter of Burlington Northern, Glasgow Agency, Docket T-93.115.RR, Order No. 6277, ¶¶ 18 and 19 (February 4, 1994).

23. At the same time the PSC has declared that it does not intend to present obstacles to the modernization of BN's operations. The PSC simply has a statutory obligation to ensure that the public convenience and necessity is not compromised by a railroad's actions done prior to review by the PSC. Id., ¶ 20; see also, Glasgow, Order on Reconsideration,

Order No. 6277a (April 6, 1994). In regard to this aspect of agency services, the PSC has also held that so long as a railroad continues to maintain and staff agencies as they were maintained and staffed on January 1, 1987, having its staff performing agency functions pertaining to the shipment and delivery of freight or available to perform the same as needed, and so long as these agency services are adequately performed by the railroad, whether through the agency or some other means, the railroad is in compliance with Section 69-14-202, MCA. See, Matter of Burlington Northern, Hardin Agency Complaint, Docket No. T-9573, Order No. 6072, ¶ 80 (February 12, 1992).

24. Under all facts presented, what has occurred at Forsyth does not constitute a violation by BN. BN transferred agency functions and provided an opportunity for shippers to work through a centralized facility, but BN also maintained a local agent to perform the functions or be available to perform them as needed.

25. The second aspect of TCU's complaint, reduction of agency staff without PSC approval, also cannot prevail. Section 69-14-202, MCA, principally applies to a railroad's furnishing of freight (and passenger) services and it must be construed with this in mind. However, contrary to what BN sometimes argues, this statute, in no other fashion, is restricted in application only to an individual designated by the railroad as an "agent." It speaks in terms of "staffing" not in terms of "agents." If railroad "staff" is performing freight shipment and delivery type services or is available to perform the same, such "staff" is within the application of the statute. Also it is not a continuation of "services-in-general" type statute, it is a continuation of specific maintenance of staff and facilities (for shipment and delivery of freight) as were maintained on the applicable date. See generally, Matter or Burlington Northern, Hardin Agency Complaint, Docket No. T-9573, Order No. 6072, ¶¶ 76 and 77 (February 12, 1992).

26. The record shows that on January 1, 1987 BN had ten employees performing agency-related functions a small percent of the time. Presently it has one full time agent and one relief agent. However, the PSC cannot conclude from this that BN unlawfully reduced its staff at the Forsyth agency. If BN had designated agents or if BN had other staff, however designated, dedicated substantially to providing agency services at Forsyth and eliminated

those, the conclusion would be different. The analysis in Hardin was not intended to be applied to agency staff who as a minor incident to other tasks were performing agency functions only a small percent of the time. Hardin applies to designated agents and others performing as an agent on a substantial basis.

ORDER

1. All conclusions of law which can properly be considered an order and which should be considered as such to preserve the integrity of this Order are incorporated herein as an order.

2. All pending objections, motions, and arguments not specifically having been ruled on in this Order, if any, shall be deemed denied, to the extent that such denial is consistent with this Order.

3. Being fully advised of all premises it is **HEREBY ORDERED** that TCU's complaint concerning BN's agency services at BN's Forsyth agency is **DENIED** and BN's application for discontinuation of agency services at the Forsyth agency facility is **GRANTED**.

4. BN shall afford affected employees protection pursuant to applicable provisions within Title 69, ch. 14, part 10.

5. BN is requested to remain a responsible industry in the Forsyth area. In this regard, BN should continue to communicate with the local area law enforcement and related entities to establish and maintain a means of ensuring that community and railroad communications essential to public safety can occur without problem. The local government entities are also encouraged to request necessary information (safety related telephone numbers and contact persons) from BN and distribute that information to the local personnel directly responsible for safety.

Done and dated this ____ day of July, 1995.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

**NANCY MCCAFFREE, Commissioner and
Hearing Examiner**

ATTEST:

**Kathlene M. Anderson
Commission Secretary**

(SEAL)

NOTE: This Proposed Order is a proposal for decision. Each party has the opportunity to file exceptions, present briefs, and have oral argument before the PSC prior to Final Order. See, Section 2-4-621, MCA. Exceptions and briefs must be filed within 20 days of the service date of this Proposed Order. Briefs opposing exceptions must be filed within 10 days thereafter. Oral argument, if requested, must be requested at or prior to the time of briefing. See, ARM 38.2.4803 and 38.2.4804.

No transcript of the hearing on this matter has been ordered by any party or the commission. If exceptions are filed as to any finding of fact, the party making the exception shall provide a complete transcript and reference the portions of the transcript which pertain to the exception.